Gasko & Meyer, Inc. *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 445. Cases 3-CA-9329, 3-CA-9344, and 3-RC-7557

April 6, 1981

DECISION AND ORDER

On November 21, 1980, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order,[1] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Gasko & Meyer, Inc., Cochecton, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(c) and reletter the following paragraph accordingly:

"(c) Promising employees an increased number of holidays if they would forsake the Union."

2. Substitute the following for paragraph 2(b):

"(b) Post at its place of business in Cocheton, New York, copies of the attached notice marked 'Appendix.'[6] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material."

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that Case 3-RC-7557 be, and it hereby is, severed from this consolidated complaint and remanded to the Regional Director for Region 3; and that the ballot of the employee found herein to be valid be opened and counted by the Regional Director in accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, and a revised tally of ballots be issued and served on the parties. In the event the Union has received a majority of the valid ballots cast, the Regional Director shall issue the appropriate certification of representative. In the event the Union has not received a majority of the valid ballots cast, IT IS HEREBY ORDERED that the election conducted on October 10, 1979, be, and it hereby is, set aside. The Regional Director shall conduct a new election when, in his discretion, a fair and free election can be held.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge, refuse to recall, or otherwise discriminate against employees in regard to their hire or tenure of employment because of their membership in, or activities on behalf of, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 445, or any other labor organization.

WE WILL NOT interrogate employees concerning their union activities.

WE WILL NOT tell employees that they will be laid off or discharged because of their union activities, or solicit them to deal with us and not through the Union.

WE WILL NOT tell employees that they were given wage increases to dissuade them from supporting the Union.

WE WILL NOT promise employees an increased number of holidays if they would forsake the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Donald Fulton immediate and full reinstatement to his former position of employment or, if that position is no longer available, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he may have

[1] *Atlantic Creosoting Company, Inc.*, 242 NLRB 192 (1979), relied on by the Respondent, is clearly distinguishable on its facts. Here, the Respondent did not, in fact, abolish the position of seasonal helper. Further, the Respondent failed to reinstate Fulton as an attempt to avoid what it feared to be high union wages, not as a means to increase operating efficiency.

suffered by reason of our unlawful discrimination against him, with interest.

GASKO & MEYER, INC.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: With all parties represented by counsel, this consolidated proceeding was heard before me in Liberty, New York, on June 30 and July 1, 1980, upon a consolidated complaint and notice of hearing dated November 1, 1979, amendments to the complaint thereafter filed and served on March 17, 1980, and June 18, 1980, and thereafter further amended at the hearing. Respondent duly filed answers and amended answers to the above-consolidated complaint as amended.[1] The amended consolidated complaint alleges various acts of Respondent constituting independent violations of Section 8(a)(1) of the National Labor Relations Act, as amended; and violation of Section 8(a)(3) by the alleged unlawful termination of its employees, Donald Fulton and Russell Peters, respectively on September 10 and 11, 1979. In addition, the Acting Regional Director for Region 3 of the National Labor Relations Board ordered, in his November 16, 1979, Report on Challenges and Objections in the above-captioned representation case that, as described more fully below, the determination of certain challenges and objections in the representation case required a hearing and directed that that hearing be consolidated with the hearing in the unfair labor practice cases in order to avoid unnecessary cost and delay. The objections and challenges are included within the violations of Section 8(a)(1) and (3) of the Act as alleged in the consolidated complaint; however, not all allegations of Section 8(a)(1) constitute objections and challenges. Thus, there are allegations of 8(a)(1) violations of the Act which are not part of, nor do they constitute, objections or challenges to be heard in this proceeding.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses and to argue orally on record. At the close of the evidence, the parties waived oral argument and elected to file briefs. Following the close of evidence, briefs were received from Respondent and the General Counsel.

Upon the entire record made in this consolidated proceeding including the briefs, and upon my observation of the demeanor of the witnesses as they testified before me, I hereby make the following:

FINDINGS OF FACT

I. BUSINESS OF RESPONDENT

The complaint alleges, and I find, that Gasko & Meyer, Inc., Respondent herein, is, and has been at all material times, admittedly a New York corporation engaged in the business of wholesale sale and distribution of beer and other beverages, with a principal office and business in the town of Cochecton, State of New York, where it maintains an office and warehouse. During the 12-month period ending November 1979, Respondent, in the regular course of its business operations, received products valued in excess of $50,000 of which products valued in excess of $50,000 were shipped to its Cochecton, New York, warehouse directly from points located outside the State of New York. I conclude, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that, at all material times, Local 445, International Brotherhood of Teamsters, the above-captioned Charging Party, has been and is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent's chief operating officer and president since 1961, an admitted supervisor within the meaning of Section 2(11) of the Act, has been and is Bruce Meyer.

Sometime in or about July 1979, the Charging Party, Local 445, commenced an organizational effort among Respondent's truckdrivers and helpers. At that time, Respondent ordinarily employed six regular truckdrivers (Peters, Quall, Just, Rohrmann, Robert Stevenson, and Paul Van Ginhoven, as a sixth driver, who drove only about three times a week and acted as a helper twice a week), a seasonal helper (Fulton), and an irregular helper called in from time to time (Leonard Stevenson, father of regular truckdriver Robert Stevenson). Respondent also employed three salesmen and a bookkeeper and a general manager in the office.

On August 10, 1979, a petition for certification as collective-bargaining representative in a unit of Respondent's full-time and regular part-time drivers, helpers, warehousemen and salesmen was filed by Local 445. Commencing August 30, 1979, the Union engaged in an economic strike and recognitional picketing at Respondent's place of business. On Thursday, September 6, 1979, in the late morning, the Union dispatched a telegram (G.C. Exh. 4) to Respondent making an unconditional offer to return to work on Monday, September 10, on behalf of all the striking employees. On September 6 or 7, 1979, all picketing ceased.

On or about Monday, September 10, the alleged discharge of Donald Fulton, occurred; on September 11, the alleged unlawful termination of Russell G. Peters, Jr., occurred as well as the issuance by the Regional Director for Region 3 of his Decision and Direction of Election in the above-petitioned unit of drivers, helpers, warehousemen, and salesmen. It is undisputed that on September 6, 1979, Respondent hired employee Brock; on September 7, employee Whitmore; and September 8, employee Sawall; that on April 2, 1980, Respondent hired John Moss; on June 3, 1980, Respondent hired Richard Buck, and on September 1, 1980, Emmanuel Pzudarkis.

[1] The charge in Case 3-CA-9329 was filed and served by Local 445, International Brotherhood of Teamsters, herein called the Union, on September 20, 1979, and in Case 3-CA-9344 on September 24, 1979.

The Board-conducted election was held on October 10, 1979, with the certification of results showing that, of approximately 16 eligible voters, 3 votes were cast for the petitioner, 5 votes against the petitioner, and there were 8 challenged ballots. Of the eight challenged ballots, the Acting Regional Director, pursuant to his November 16, 1979, Report on Objections and Challenges, directed the opening of six of the challenges, directed that a hearing be held on the remaining two challenged ballots (the ballots of the alleged discriminatees herein, Fulton and Peters), and directed that *inter alia*, as specifically alleged objectionable conduct, the alleged unlawful discharges of Peters and Fulton be heard.

In addition, with respect to certain Respondent conduct not specifically alleged in the objections (but which was discovered during the course of investigation of the specifically alleged objections), the Acting Regional Director directed that alleged acts of interrogation, unlawful offers of direct dealing, and promises of holidays, wage increases, and other benefits, which acts were alleged as independent unfair labor practices in violation of Section 8(a)(1) of the Act in the consolidated complaint, be also heard as objectionable conduct which might have affected the outcome of the election. The occurrence thereof, on dates between the filing of the petition and the election, could be found to have interfered with the conduct of the election. *The Ideal Electrical and Manufacturing Company*, 134 NLRB 1275 (1961).

A. *Violations of Section 8(a)(1) and the Identical Objections Found in Conduct Not Specifically Alleged in the Objections*

On February 1, 1980, the Board, affirming the Acting Regional Director, ordered that six of the eight challenged ballots be overruled and the ballots be opened and counted. On February 6, 1980, this was executed. A revised tally of ballots, dated February 6, 1980 (G.C. Exh. 1 (p)), showed seven votes for and seven against the Union with two challenged ballots undetermined. The remaining two undetermined challenged ballots are those of the two alleged discriminatees, Fulton and Peters. If they or either of them were unlawfully terminated, their ballots must be opened and counted. Since the election resulted in a tie vote, their ballots may be determinative.

Since the petition herein was filed on August 10, 1979, and the election was held on October 10, 1979, it is only those alleged violations of Section 8(a)(1) of the Act which, alleged as objections herein, can constitute conduct which might so interfere with the conduct of the election as to cause the election to be set aside. See *The Ideal Electric and Manufacturing Company, supra*. It should be noted, as Respondent suggests, that under the present Board rule not every unfair labor practice, if found, is of such significance as will cause the election to be set aside. Compare *Caron International, Inc.*, 246 NLRB 1120 (1979); and *Super Thrift Markets, Inc. t/a Enola Super Thrift*, 233 NLRB 409 (1977); with *Coca-Cola Bottling Company Consolidated*, 232 NLRB 717 (1977). The fact to be determined is whether the employer conduct may be said to be *de minimis* with respect to affecting the results of an election, taking into consideration the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors, *Caron International, Inc., supra*. It is clear that the *de minimis* rule has no application here.

The complaint alleges various acts in violation of Section 8(a)(1) committed by Bruce Meyer, Respondent's president. In response to the testimony adduced by witnesses called by the General Counsel, Respondent offered no evidence denying such conduct and subsequently failed to brief the matter. Rather, Respondent relied on the arguments that (1) the allegations of violations were not proved or in any event not proved in conformity with the complaint; or (2) as a partial defense, they constituted mere violations of Section 8(a)(1) of the Act and, because of the dates of the occurrences of said violations, did not constitute objections which could lawfully be used, regardless of severity, as conduct which so affected the election as to cause it to be set aside. None of these defenses avails Respondent.

B. *Interrogation and Threat of Discharge*

The complaint alleges that President Bruce Meyer engaged in unlawful interrogation of employees on August 15 and 30, 1979, and March 11, 1980.

The testimony of Paul Van Ginhoven, a driver of 5 years' standing, testified that on August 15, i.e., 5 days after the filing of the petition, while alone with Bruce Meyer, at or about 11 a.m., Meyer in a conversational tone asked him whether he attended a union meeting and had discussed possible benefits and conditions of employment. Van Ginhoven admitted that he had attended and Meyer told him that he was sorry that Van Ginhoven did not see Meyer first and let him know about the meeting. Meyer then asked Van Ginhoven what the Union was offering in terms of benefits and also asked whether there was anything that Meyer could do for the employees. Van Ginhoven told him that he did not know, but that the Union was discussing getting the employees a better health plan, a retirement plan, and eventually a dental plan. Such questioning, especially in light of what was to follow, constitutes coercive interrogation in violation of Section 8(a)(1) of the Act. *Laredo Coca Cola Bottling Company*, 241 NLRB 167 (1979).

Meyer then asked him if he knew what it cost him to keep the employees in the company health plan. When Van Ginhoven did not answer, Meyer assumed a threatening tone and asked Van Ginhoven: "How would it be if you were laid off this winter?" Van Ginhoven again made no response but testified that he had never in his 5 years of employment been laid off by Respondent.

Van Ginhoven testified that in March 1980, while unloading his truck after a day's run, he was alone with Bruce Meyer who asked him whether he had heard from the Union.[2] When Van Ginhoven said that he had not heard from the Union, Meyer asked him whether "if a picket line starts again, are you prepared to cross it?" Van Ginhoven said he had not thought about it and Meyer said: "Well, you better start thinking about it."

[2] The evidence adduced at the hearing indicates that, at or about this time, counsel for Respondent was seeking a postponement of the hearing date in the instant unfair labor practice case.

Respondent argues that there is no explicit threat of discharge. I conclude that there is an implicit warning of retaliation based on Van Ginhoven's refusal to declare positively his willingness to cross a picket line if one started again. Contained within it is an expression of retaliation based on the suppressed premise that it would be to Van Ginhoven's advantage to start thinking about changing his mind about crossing a picket line which, in the past, he had refused to do. While it is true that theoretically one could argue some benign inference should be drawn from Meyer's admonition, I conclude, especially in view of Van Ginhoven having been previously threatened with a layoff or discharge, that the same implication existed in this, the warning to cease avoiding the issue and to change his mind.

I conclude that on August 15, 1979, and in or about March 1980, Respondent unlawfully interrogated Van Ginhoven, threatened to discharge him, or lay him off, and threatened to retaliate against him. Since the unlawful acts of August 15 (interrogation; threat of discharge or layoff) occurred in the period between the filing of the petition and the election; and since it is undisputed that, with regard to Meyer's hostile August 15 conversation, Van Ginhoven told his driving partner David Falls and another truckdriver George Just of this August 15 threat ("How would it be if you were laid off this winter"), I conclude that, in a unit of about 16 employees, at least 3 employees knew of a hostile threat to lay off following interrogation of union plans and benefits and that therefore there exists evidence of widespread dissemination of a serious threat among these and other employees. I further conclude that not only was the August 15, 1979, threat accompanied by unlawful interrogation and that both constitute serious violations of Section 8(a)(1) of the Act, but that both constitute widely disseminated, serious objectionable conduct (occurring between the time of the filing of the petition and the election) on the basis of which I recommend that the election herein be set aside.

C. *Promise of Benefits*

The complaint alleges that on or about August 20 and 30, both dates within the period prescribed for objectionable conduct affecting the outcome of the election, Bruce Meyer promised employees holidays, wage increases, and other benefits in order to induce them to abandon their union support.

Van Ginhoven and other employees testified without contradiction that on August 30, 1979, a union picket line was placed in front of Respondent's warehouse. All seven drivers and helpers including himself were on the picket line. At or about 7:30 a.m., after they had arrived with a Local 445 sign, Bruce Meyer came out of the warehouse and asked them if they were coming to work. Starting time had already passed and it was about 7:45. Driver Qualls said that they were not coming to work and that the union representatives were coming to speak to him (Meyer). Meyer returned to the plant but emerged an hour or so later and asked them if they were coming to work in view of the fact that a date for an election was already selected. The men told him that they were awaiting the arrival of the union representatives and would not come to work. With that, Meyer told him: "I'll give you five paid holidays." They did not answer him and he returned to the plant. I conclude that Meyer's August 30 statement was a promise of five paid holidays and constituted an unlawful promise of a benefit (the uncontradicted evidence shows that the employees had no paid holidays) if the employees would abandon their picket line and union activity. Such a promise not only violates Section 8(a)(1) of the Act but, like the above-noted interrogation and threats of layoff on August 15, 1979, come within the period proscribed for objectionable conduct and affects the conduct of the election. I conclude that this widely disseminated promise to 7 of a unit of no more than 16 employees constitutes objectionable conduct of such a serious nature as to affect the conduct of the election. I recommend that, consistent with the terms of my recommended Order, *infra*, the election be set aside on the basis of this August 30, 1979, objectionable conduct which also constitutes an unlawful promise of benefits within the meaning of Section 8(a)(1) of the Act.

D. *Offer of Direct Dealings With Employees Regarding Wages*

The complaint alleges and I find that in the above conversation on August 15, between Meyer and Van Ginhoven, that when Meyer told him: "Is there anything I can do for you" after inquiring what the Union was offering, Meyer was unlawfully soliciting Van Ginhoven to deal directly with him concerning his wages, hours, and terms and conditions of employment rather than dealing with Van Ginhoven's selected bargaining agent, the Union. Such a solicitation violates Section 8(a)(1) of the Act and, since it occurred on August 15, in conjunction with unlawful interrogation and a disseminated threat to discharge or lay off Van Ginhoven, is serious enough to merit the conclusion that it, too, was disseminated and interfered with the conduct of election.

E. *Other 8(a)(1) Violations*

The complaint, as amended, alleges that on or about December 22, 1979, Meyer told an employee that he was receiving a wage increase in order to dissuade him from supporting the Union. Thus, Van Ginhoven testified that in December 1979 his rate of pay was $185 a week. In December 1979, while alone at night with Meyer, Meyer told him that although he had not heard from the National Labor Relations Board with regard to the propriety of a pay raise, since Van Ginhoven was now driving on a regular basis and not merely acting as a helper, he was going to get a raise at the end of the week to the rate of the regular drivers, a raise greater than that received by the regular drivers.

On the Friday before Christmas, Meyer told Van Ginhoven: "Now look, I have given you your raise equal to or better than the other drivers. If it comes to a union vote again, I expect some support." I conclude that, by this statement, Meyer, as alleged, unlawfully informed Van Ginhoven that he had received the raise in order to dissuade him from supporting the Union and that it was for the purpose, *inter alia*, of Van Ginhoven voting

against the Union in any upcoming election. Such a statement itself constitutes a violation of Section 8(a)(1) of the Act because of its coercive effect on Van Ginhoven's vote and because it conditions future pay raises upon the employer's satisfaction that the employee properly "supported" him. I find such a statement violates Section 8(a)(1) of the Act.

F. *Employer's Threat To Reduce an Employee's Wages*

Finally, pursuant to an allegation added at the hearing by amendment, the complaint alleges that, in March 1980, Respondent impliedly threatened to reduce an employee's wages because of his support of the Union. Carl Rohrmann, a driver employed by Respondent for 17 years, and a striker and picket, testified that in or about March 1980, at or about 3:30 p.m., while he was working, Meyer suddenly said to him that he was not "working for the Teamsters now" and that pretty soon his salary would be "pretty small." The record shows that this was essentially an admonition against Rohrmann working at a slow rate. I believe that this statement by Meyer might be construed as a threat to reduce Rohrmann's salary but it is unclear that it was a threat conditioned upon the failure or the success of the Union to gain recognition. I conclude that, although there was animus against Local 445 present in the statement, that there was no condition expressed along with the animus that a diminished salary would result from his working under union conditions. I recommend that the complaint allegation, as far as it alleges that a threat to reduce his wages because of support of the Union, be dismissed as unproven.

G. *The Alleged 8(a)(3) Violations: the Terminations of Fulton and Peters*

As above noted, the September 10 and 11 terminations of Fulton and Peters are alleged to constitute not only violation of Section 8(a)(3) and (1) of the Act as unfair labor practices but, in addition, are the subject of specific objections to the election and of challenges with respect to which the Acting Regional Director directed a hearing. When Fulton and Peters attempted to vote in the above-captioned representation matter, Respondent challenged them because their names did not appear on the eligibility list. Respondent said Fulton's job had been eliminated and Peters had quit. Their alleged discharges were thus alleged as such objectionable conduct as to constitute grounds for setting aside the election since the terminations occurred on September 10 and 11; i.e., between the August 10 filing of the petition and the October 10 election.

Since I find that Fulton was unlawfully terminated, I conclude that his ballot be opened and counted, and that his discharge is objectionable conduct, within the terms of my Order, requiring that the election be set aside.

H. *The Alleged Discharge of Russell G. Peters, Jr.*

Peters, employed as a regular truckdriver by Respondent for 12 years, was one of the seven strikers and pickets who were on the picket line on August 30, 1979. It is undisputed that on September 6, 1979, as above noted, the Union sent a telegram (G.C. Exh. 4) by telephone, confirmed the next day (September 7) by mail, informing Respondent that the employees were unconditionally offering to return to work on Monday, September 10.

On Monday, September 10, along with the six other employees (including Donald Fulton, the seasonal helper), Peters filed into Respondent's warehouse. With regard to Peters, Meyer asked him what he was doing there that day rather than the next day. There is no dispute that some of the drivers worked the 5-day period, Monday through Friday, while others, including Peters, worked the 5-day period Tuesday through Saturday. Thus, Meyer inquired what Peters was doing there on Monday since his regular workweek started on Tuesday and said: "Russell, tomorrow is your day to work. See you tomorrow."

On the next morning, Tuesday, September 11, Peters did not report to work at the starting time, 7:30 a.m., and was at home. Meyer telephoned him at home at or about 8 a.m., asking if he was coming to work since he was supposed to be at work that morning and had not appeared. Peters testified, and Meyer denied, that Peters then said: "Are the others back" or "Are the others coming back?" Meyer denies that at any time Peters said that he would not return unless the other employees, who were not taken back, were taken back, and, indeed, never mentioned other employees. I credit Meyer on what Peters did not say, but find that Peters merely asked if the others were coming back. Peters asserts and I find that after he asked whether the other employees were back or were coming back, Meyer responded by asking, "Look, you want to work or not? Are you quitting or working or not?" Peters at first said that he answered by saying: "I don't know" and hung up the phone. He later testified that his answer was: "Whatever you say" or "Suit yourself," and hung up. I credit his latter version. Meyer recalls that, after Peters got "huffy," Peters said that he was "not coming in . . . I quit." Meyer also said that Peters "implied" that he (Peters) was looking for another job. I do not credit Meyer's testimony that Peters said he "quit" or that Peters "implied" he was looking for another job.

It is undisputed that, since that September 11 telephone call, Peters had no contact with Meyer and operated his farm as he had done while employed by Respondent.

Peters never applied for unemployment insurance but, as counsel for Respondent suggests, Peters, a farmer, would not be eligible for unemployment insurance in any case. The record shows that on September 17 (G.C. Exh. 1(a)) the Union mailed to the Board for filing the original charge in Case 3-CA-9329 which alleged the unlawful refusal to reinstate, *inter alia*, Peters.

Between the above September 11 telephone conversation and the September 17 mailing of the charge, Respondent, on September 14, 1979, dispatched to Peters (which he apparently thereafter received in the mail in due course) a letter (G.C. Exh. 5) as follows:

This is to confirm our recent conversation in which you notified me that you were terminating your employment with us.

I had received a telegram from Local 445 telling me that all strikers would be returning for work on Monday, September 10. I had planned on you returning to work on Tuesday, September 11, the beginning of your regular work week. Although you had come in with the others on Monday, you did not appear on Tuesday as I told you to do on Monday. When I called you at home on Tuesday morning, you told me that you were no longer interested in working for Gasko & Meyer and would be looking for another job. Accordingly, we have noted you as a quit as of September 11, 1979.

We have computed your accrued vacation pay, and enclosed is your check to the amount of $362.86.

We will let you know about your retirement plan as soon as possible.

Please be assured that we will be pleased to send a favorable recommendation to any respective employer.

Finally, I extend my best wishes to you in your future endeavors.

Yours very truly,
s/s Bruce Meyer
Bruce Meyer, President

It is undisputed that, within a matter of months, Respondent dispatched to Peters his accrued retirement funds which Peters accepted without statement.

Discussion and Conclusion

Upon my observation of Bruce Meyer and my inspection of the record, it is clear to me that Meyer was a witness requiring continual, almost constant, leading in order to describe the facts as he knew them. Moreover, he was incapable of explaining what he meant by Peters becoming "huffy" over the phone and did not elaborate what he meant by his testimony that Peters, in the phone conversation, "implied" that Peters was looking for another job. In comparison with that testimony, his letter to Peters of September 14, 1979,[3] does not suggest that Peters "implied" that he was looking for another job and thus states it without equivocation or qualification. In addition, the latter contains the statement that Peters told Meyer that he "was no longer interested in working for Gasko & Meyer," whereas, in his testimony, Meyer said that in the telephone conversation Peters said that he was "not coming in," "I quit." The September 14 letter states that Peters notified Meyer that he was terminating his employment, was no longer interested in working for Respondent, and would be looking for another job. Meyer's letter therefore expands quite a bit on the phone conversation. Also, in the first version of Meyer's testimony, there is nothing about Peters having said that he was going to quit. It was rather after constant prodding that Meyer testified that Peters said, "I quit."

In short, I was not at all satisfied with Meyer's overall credibility and, as above noted, I have not credited him in essential elements of the telephone conversation with Peters on September 11.

The question remains, however, whether to credit Peters. At the hearing, Peters lost no time in demonstrating a short temper and would appear to me to be a combative personality. I was also impressed, as above noted, by his inability accurately to recall whether he said, in response to Meyer's question whether he was quitting, "I don't know," and then hung up the phone or "suit yourself," "whatever you say." In either of the latter versions, which I have credited, Peter's curt and short reply to Meyer and then an immediate hanging up of the phone would be totally in keeping with Peters' demonstrated short temper and personality.

In short, I do not credit Meyer's testimony that Peters said that he quit. Rather, on balance, I credit Peters that he actually answered either "suit yourself" or "whatever you say" and then hung up.

I am not impressed with Respondent's argument that Respondent's letter of September 14 (noting that it was carrying Peters as a "quit" as of September 11, which Peters could not have received much before September 15 or 16 in view of the fact that Respondent did not suggest that the letter was hand-delivered on September 14) went unanswered since, on the evidence before me, the Union on September 17, 1979, a day or so after Peters' receipt of the letter dispatched a formal charge alleging violation of Section 8(a)(3) and (1) of the Act concerning his termination (as well as other employees whose charges were dismissed by the Region). Thus it seems to me that neither the Union nor Peters rested on their oars or accepted Respondent's characterization of the telephone call as an admission that Peters said that he quit. That there is no proof that the Union knew of the letter or consulted Peters is not controlling. I am also not impressed with Respondent's further argument that, since the word "quit" was used in the phone conversation, Peters must have quit. To the contrary, it was Meyer who wanted to know if Peters quit.

The General Counsel suggested as his theory of the unlawfulness of the termination on September 11 that Peters, in the phone conversation, by mentioning the replaced employees ("Are the others back" or "Are the others coming back") demonstrated that whether or not the Union, in its September 6, 1979, telegram, offering unconditionally to have employees return to work on September 10, ceased striking, Peters continued the existing strike or initiated his own strike. This strike resulted from Respondent's failure to call back employees Kenneth George Just, Jr., and David M. Qualls, Jr. Most particularly, under no version of any Peters declaration did he *condition* his return on the return of other employees. He merely made inquiry as to their return. It is an entirely open question whether, if they did not return, he would quit or, on the other hand, refuse to return until their return.

[3] It was conceded by counsel for Respondent that Bruce Meyer contacted counsel prior to writing and dispatching this September 14, 1979, letter.

I conclude, nevertheless, that the evidence does not support the General Counsel's theories. Rather, upon the Union's telegram offering unconditionally to have the employees return to work on September 10, Peters, in fact, returned to work. The unconditional offer was accepted. Peters' appearance for work on September 10 was the final step in offer, acceptance, and execution. It appears that he thereafter learned, later on September 10, that other employees had not returned to work. The General Counsel suggests that Peters had reinstituted a strike in conjunction with the failure to employ the other employees. I find, as a fact, that Peters imposed no condition on his own return and I agree with Respondent that, although Peters' option in refusing to return to work (upon learning that others had not returned to work) may have been an attempt by him to in some way ally himself with the other employees on this record, it was not made conditional and the General Counsel failed to prove the aim of Peters' conduct. I therefore conclude, contrary to the General Counsel, that, as of the morning of September 11, there is insufficient proof that Peters was engaged in a protected concerted activity along with employees Just and Qualls who had not been reinstated. Cf. *Steere Dairy, Inc.*, 237 NLRB 1350 (1978).

On the other hand, I do not credit any evidence that he said that he quit. Rather I credit Peters in saying that he said, "Suit yourself" or "Whatever you say," and then hung up, and that Meyer seized upon Peters' equivocal answer to Meyers' suggestive inquiry ("So you are quitting then"), thereafter incorporating it in a self-serving memorialization.

Thus, between the Tuesday, September 11 phone conversation and continuing through the Saturday, September 14 letter (i.e., Peters' entire weekly shift), Peters failed to come to work or to contact Respondent. On this record, he persisted in absenting himself from employment (to which he had, on September 10, agreed to return) but whether to exert pressure on Respondent, by his absence, to reinstate two permanently replaced economic strikers or as a manifestation of such personal displeasure as to cause him to quit is the question. Respondent, entitled to maintain its business, inquired into Peters' intentions on quitting and received an equivocal response, followed by 4 further days of Peters' failing to appear for work or contacting Respondent.

There is no suggestion much less proof that Respondent had any particular animus directed against Peters or that Meyer's inquiries and conduct demonstrated pretextual qualities. Rather, Peters had already demonstrated his desire to return to work on September 10, which Respondent accepted, and then absented himself on the next day, contrary to his prior affirmation. Meyer's September 11 inquiry is devoid of animus—merely an inquiry as to Peters' intent to continue to work for Respondent. Peters not only evaded an answer, then hung up on his employer, but failed to work or even thereafter contact Respondent for 4 days after the phone conversation. If Meyer was not entitled on and between September 11 and 14 to construe Peters' actions as a quit, when, if ever, could he? When, if ever, could he replace him? As above noted, after the phone conversation, he absented himself for his entire workweek.

If a quit is found where employees, during an economic strike, remove their tools when the employer is desirous of having them work, despite their spokesman's denial of quitting, *Pink Supply Corporation*, 249 NLRB 674 (1980), then here, certainly after a strike, where the employee returns to work, thereafter fails to appear and is given a full further opportunity and invitation by the employer to confirm his desire for continued employment but then fails to do so, tells the employer to "suit himself" and hangs up the phone, and continues to absent himself from the job, the employer is entitled to construe the absence as a quit in the face of Peters' "suit yourself." See *Pennypower Shopping News, Inc.*, 253 NLRB 85 (1980). A small business cannot be managed on contrary standards. Unlike even *Pink Supply Corporation, supra*, where the Board found a "quit," Respondent here created no ambiguity by virtue of any wrongdoing: Peters had returned to work on September 10 pursuant to the unconditional offer of September 6 and Respondent had introduced no impediment. Here, any ambiguity rests solely on Peters who created it; compare *Pennypower Shopping News, Inc., supra*, with *The C. J. Krehbiel Company*, 227 NLRB 383, 384 (1976). The only thing he did not say or suggest was that he would not return to work unless the replaced economic strikers were rehired. Cf. *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1976); *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d. 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). In these circumstances, the General Counsel has failed to meet his burden of proof, and the complaint as to Peters must be dismissed.

I. *The Alleged Unlawful Termination of Donald Fulton*

Donald Fulton was employed by Respondent as a truck "helper," the only helper employed on a "seasonal" basis. He was regularly employed in that capacity commencing 1970 in the busy period from April to October each year. It is undisputed that he was a striker and picket and that on Monday, September 10, he and other erstwhile striking employees returned to the warehouse after the Union sent its September 6 offer of unconditional reinstatement. Meyer told him, according to Donald Fulton, "I don't need you today . . . I'll call you when I need you." It is undisputed that Meyer never contacted Fulton thereafter. According to Meyer's first testimony, he told Fulton, when he saw him on September 10: "Your job has been eliminated and I don't think I have any work for you." Thereafter, Meyer testified that, rather than having said, "I don't think I have any work for you," he said: "I don't have any work for you." Meyer said that Fulton merely answered "Okay" and left. Fulton did not appear for work the next day. I do not credit Meyer. I credit Fulton.

The General Counsel, it is admitted, presented a *prima facie* case in having proved that Fulton was a known striker and was not reinstated to his job upon unconditional offer to return to work at the conclusion of the strike. *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U.S. 21 (1964); *General Telephone Company of Michigan*, 251 NLRB 737 (1980). Counsel for all parties agree that the

legal problems flowing from Respondent's failure to reinstate him, as an economic striker, are governed by *N.L.R.B.* v. *Fleetwood Trailer Company, Inc.*, 389 U.S. 375 (1967), and *New Orleans Roosevelt Corporation*, 132 NLRB 248 (1961), wherein the burden of showing that there was an economic justification for the failure to reinstate him (the abolition of his job as a seasonal helper) shifted to Respondent as an affirmative defense. Where a discriminatory motivation underlies the abolition of a job, however, it is unnecessary to reach or evaluate the economic basis of the abolition defense. *Bio-Medical Applications of New Orleans, Inc., d/b/a Greater New Orleans Artificial Kidney Center*, 247 NLRB 973 (1980). Such is the case here.

Respondent's defense to the failure to reinstate seasonal helper Donald Fulton (and the General Counsel's *prima facie* case) was that his job was "abolished."

J. *Respondent's Defense: The Abolition of the Position of Seasonal Helper*

Meyer testified that he decided to "tighten up" Respondent's operations because of the August 30 strike and the decision would not have occurred but for that event.

The record is also not disputed that Leonard Stevenson, employed before 1970 and thereafter, worked every summer as an "extra" and was only a helper. He was not a regular helper but was called only when needed. Before the strike, there were three employees who were in any sense "helpers." These were Leonard Stevenson, an "occasional" helper; Paul Van Ginhoven, a "driver-helper" (Van Ginhoven drove various trucks 3 days per week and acted as a helper on trucks 2 days per week) and Donald Fulton, a "seasonal helper." None of these helpers were paid as much as drivers prior to the strike.[4]

After the August 30–September 10, 1979, strike, Stevenson's occasional helper position remained the same. Meyer said he decided that Respondent could get along with six drivers, made Van Ginhoven a driver, and abolished Fulton's position of "seasonal helper." Thus, at the end of the strike, it had four new employees: Dieter Sawall, a driver trainee; Frank Brock, a driver who had no experience on large trucks; Pzarudakis, a casual helper (who quit September 18, 1979), and Thomas Whitmore, an experienced heavy truckdriver.

The record shows that Sawall was not capable of driving Respondent's heavy beer delivery trucks and was only a helper when hired. He had no license entitling him to drive heavy trucks and is still a helper. Brock left on January 4, 1980, and never received a chauffeur's license. Whitmore was at all times a heavy truckdriver and Pzarudakis quit on September 18, 1979, upon one week's notice. Thereafter, Respondent hired John Moss on April 2, 1980, as a heavy truckdriver, and Richard Buck on June 3, 1980, as a driver-trainee. Meyer testified that Buck was hired in fact as a trainee for a sales position because of the expected retirement of a Respondent salesman. However, admittedly Buck has never traveled the territory except as a driver-trainee delivering beer. Indeed, as late as the date of the hearing on June 30, 1980, he worked only as a helper, delivering beer. Meyer testified that there is no regular helper employed by Respondent since the termination of Donald Fulton.

Meyer said that his decision to abolish Fulton's job as a seasonal helper occurred on September 4 when he consulted with counsel for Respondent in a meeting in Kingston, New York, notwithstanding his other desultory testimony concerning his desire to change existing forms of employment and to tighten up his operation in conversations with his accountant some months before the strike. This testimony remained vague. I do not credit it. In the meeting of September 4, 1979, with his attorney in Kingston, New York, he divulged, he said, a plan whereby he would change the routing of the deliveries and compress the number of routes and their frequency so that he could get along with only six regular truckdrivers rather than six drivers and a seasonal helper. This followed a telephone conversation of the week before in which his attorney admonished him to try to tighten his operation because Respondent had complained that his business was failing and that he could not survive at the present rate. Thus Meyer testified at length concerning the compression of the number of routes and the number of trucks required to fill the routes, thus implying that he could operate with six drivers during the winter slow months. They could, he said, easily do the loading and delivering of beer and soft drinks in the winter and early spring but in the peak months, starting certainly no later than June and ending after Labor Day, would have to work very hard indeed to perform their full jobs in a 40-hour, 5-day week.

Finally, Meyer testified that he wanted to "tighten up" his operations and abolish the position of seasonal helper which Fulton occupied because the payroll obligation for the seasonal helper, plus the extra cost of unemployment insurance and social security contributions, was a luxury that he could thereafter not afford in view of the anticipated union pay scales. Meyer testified that he decided to abolish the job because he anticipated that, if he ended up dealing with the Union, he would be paying for a job which he regarded as a luxury.

Consistent with Respondent's assertion that its business was suffering, it introduced evidence to show that, in the years 1976 through 1979, the total number of units sold (cases of beer and soda and barrels of beer) shrunk from 280,444 to 204,165. And in view of the decrease in number of units sold (Resp. Exh. 3) and although its dollar sales rose considerably in 1977 and 1978, this was due to price rises initiated by the brewer from which Respondent received only scanty additional profit margins.

Discussion and Conclusions

Although the burden of proof is on Respondent to prove its defense of job abolition, cf. *Associated Grocers*, 253 NLRB 31 (1980), it is here unnecessary to analyze in detail Respondent's defense that it decided to abolish Fulton's seasonal helper job in order to save money because of a business whose profitability and volume were steadily decreasing. It is unnecessary because (1) the evi-

[4] It was stipulated that in 1978, Fulton was employed for 23 weeks in the period May 30 to November 3, 1978, and 22 weeks in 1977 in the period April 22 through September 16.

dence fails to support the assertion that the job was abolished; and (2) if it was abolished, the decision to do so was unlawfully motivated. See *Bio-Medical Applications of New Orleans, Inc., supra.* In this regard, I further conclude that the evidence fully supports the conclusion that, apart from Meyer's fear of anticipated union wage demands, he would not have terminated Fulton, the economic condition of Respondent being merely pretextual. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). It is sufficient to note, for purposes of Respondent's economic defense, that Respondent advanced as one of the reasons for terminating Fulton its anticipated fear that the Union would demand excessive pay for that position. There was no showing on this record that Respondent's fear was justified pursuant to any figures submitted in evidence with regard to employers in Respondent's home county of Sullivan County, New York, or any adjoining county. In any event, to abolish a job and discharge an employee over a potential advent of the Union and its high cost, not justified by any substantiation of that fear, amounts to a violation of Section 8(a)(3) and (1) of the Act, as the General Counsel urges. I so conclude. Meyer's testimony regarding prestrike meetings and advice from his accountant remained vague and unconvincing. The testimony of post-strike discussions with his lawyer on cutting down on employees was similarly unconvincing.[5]

Moreover, the testimony adduced through Meyer showed that the employee first hired on June 3, 1980, Richard Buck, as a driver-trainee, to become a salesman, was not equipped to drive Respondent's truck and, on this record, acted only as the helper. Meyer admitted that Buck had never been out with the salesmen and therefore I conclude that, whatever the reason Meyer had in hiring Buck, he was not then training him as a sales trainee under the currently ailing salesman, but was actually using him as a summer helper on a truck on a regular basis, a job previously done by seasonal helper Donald Fulton. It must also be noted that helper Pzudarkis quit on September 18, 1979, when helper Fulton would have been laid off. I regard the hiring and use of Buck as a mere camouflage for using a summer helper, whether under the title of "driver-trainee" or "salesman trainee" or otherwise to replace the employee whose position had been allegedly "abolished" the previous September. In short, Fulton's regular summer helper job was no luxury to Respondent. Someone had to do the job. Buck did it in 1980.

I therefore conclude (a) that the job of "seasonal" helper had not been abolished on the proof that employee Richard Buck in the summer of 1980 was performing approximately the same function as the erstwhile employee, Donald Fulton, and (b) that, in any event, the motivating reason for any "abolition" was Respondent's fear that the Union would require a pay rate for Fulton greater than it was willing to pay. There was no proof, on this record, that the Union ever demanded any pay scale for the seasonal employee (much less a high pay scale) whether measured by any actual demand upon Respondent or upon any other employer similar situated or, indeed, upon any employer anywhere. No credible evidence supporting abolition of the job for business reasons was adduced. I conclude that the credible evidence shows that (1) the defense of "abolition of the job" was never proven, and (2) that the only reason Respondent terminated Fulton was its fear of the advent of high union pay scales, a fear not supported by this record in terms of any union demand. See generally, *Bio-Medical Applications of New Orleans, Inc., supra.* Respondent's poor profit picture, in view of its union animus, was pretextual. It needed and used a summer helper.

I therefore conclude that Respondent has failed to prove the abolition of the position of seasonal helper and I therefore conclude that his termination was in violation of Section 8(a)(3) and (1) of the Act as alleged in the complaint. Moreover, I conclude that any such abolition was discriminately motivated by unlawfulness in violation of Section 8(a)(3) and (1) of the Act and would not have occurred apart from Meyer's union animus and Fulton's engaging in the strike. Lastly, I have credited Fulton who testified that on September 10, 1979, Meyer told him he would be called to work when needed. Such credited testimony shows no intent by Meyer to abolish Fulton's job. Rather it shows that Meyer's termination of Fulton on September 10 was unlawful and pretextual.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating its employees on August 15, 1979, and March 11, 1980, by offering to deal directly with employees regarding wages, hours, and other working conditions, by promising its employees an increased number of holidays if they would forsake the Union, by threatening employees with discharge if they supported the Union on August 15 and March 11, 1980, and by informing an employee on December 22, 1979, that he was receiving a pay raise in order to dissuade him from supporting the Union, Respondent violated Section 8(a)(1) of the Act. Such August 15 acts justify setting aside the election herein.

4. By unlawfully terminating the employment on September 10 of Donald Fulton because he engaged in a strike, picketing, and other concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act. Such action is the subject of a timely filed objection (Objection 1) to the conduct of the election herein, held on October 10, 1979, in Case 3-RC-7557, and warrants the election being set aside.

5. The aforesaid unfair labor practices are unfair labor practices which affect commerce.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that said Respondent be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

[5] The accountant did not testify.

It having been found that Respondent unlawfully terminated Donald Fulton in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to offer him full and immediate reinstatement to his former job or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings he may have suffered from September 10, 1979, to the date of Respondent's offer of reinstatement. Backpay shall be computed according to the Board's policy set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Payroll and other records in possession of Respondent are to be made available to the Board, or its agents, to assist in such computation. Interest on backpay shall be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, and conclusions of law, and the entire record pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER[6]

The Respondent, Gasko & Meyer, Inc., Cochecton, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully discharging or refusing to reinstate employees, or otherwise discriminating against them because they sympathize with, are members of, or support Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, or any other labor organization, or because they engage in concerted activities, protected by Section 7 of the National Labor Relations Act, as amended, herein called the Act.

(b) Coercively interrogating employees, threatening employees with discharge for supporting the Union, and soliciting employees to deal directly with Respondent and not through the Union with regard to their wages, hours, or other terms and conditions of their employment, telling employees that they were given wage increases in order to have them vote against the Union in a future election and support Respondent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Reinstate Donald Fulton to his former or substantially equivalent position of employment, discharging, if necessary, any employees hired in his place, and make Donald Fulton whole for any loss of wages he may have suffered by virtue of Respondent's unlawful action against him.

(b) Post at its place of business in Cochecton, New York, copies of attached notice marked "Appendix."[7] Copies of said notice, on forms to be provided by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the challenged ballot of Donald Fulton be opened and counted by the Regional Director and, if the Union receives a majority of valid votes cast by virtue thereof, the Regional Director for Region 3 shall issue the appropriate certification of representative; and, if by virtue thereof, the Union shall not receive such a majority, then IT IS FURTHER ORDERED that Objection 1 (the unlawful termination of Donald Fulton) and the final objection (other objectionable conduct, not specifically alleged occurring during the critical period) be sustained and that the aforesaid Regional Director shall direct a second election.

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."